No. 16350

United States
Court of Appeals
For the Ninth Circuit

MERLE H. JOHNSON, Administrator
of the Estate of Stanley Matt Johnson,
—vs.— Appellant,
UNITED STATES OF AMERICA,
Appellee.

MERLE H. JOHNSON,
—vs.— Appellant,
UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States
for the District of Montana

BRIEF OF APPELLEE

NAMES AND ADDRESSES OF ATTORNEYS

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United States Attorney,
Butte, Montana;

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TABLE OF CONTENTS

CASES CITED

CASES CITED (Continued)

CASES CITED (Continued)

CASES CITED (Continued)

STATUTES CITED

TEXTS CITED

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BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

These two civil actions were brought under the Federal Torts Claim Act (28 U.S.C.A. §1346) in the United States District Court for the District of Montana. The plaintiff-appellant was a resident of Montana, and the accident complained of happened in Montana. Civil Action No. 49 was the survival action instituted by the Administrator, and Civil Action No. 54, the wrongful death action, was brought

by the father to recover damages for the alleged wrongful death of the deceased child. The Court sat as the trier of the facts and the United States is the defendant-appellee. This appeal is taken from the final judgment entered in the consolidated actions on August 11, 1958, in accordance with 28 U.S.C.A. §1291.

STATEMENT OF THE CASE

The Bureau of Reclamation maintains an electrical substation at Forsyth, Montana. On July 4, 1955, Stanley Matt Johnson, a four-year old boy, apparently climbed over the eight foot tall east gate into the substation and, apparently after climbing upon a steel framework supporting three oil circuit breaker tanks with porcelain bushings extending above them to a height considerably higher than the top of the eight foot high fences, came into contact with the metal cap at the top of one of the porcelain bushings through which electricity was passing. The boy died four hours later as a result thereof. The cases were brought on the attractive nuisance doctrine, and the Trial Court held that plaintiff failed to establish that decedent's injuries and death were caused by any act of negligence on the part of the defendant.

SUMMARY OF ARGUMENT

The defense of the defendant-appellee to these consolidated actions was that it had exercised every reasonable precaution to provide such safeguards as would reasonably prevent injury to a child of ordinary and normal instincts,

habits and training. We will argue that the burden was on the plaintiff-appellant throughout the case to prove the negligence complained of, and that he failed to do so.

The appellee will in its argument offer Federal, Montana and other citations to establish the rule of law in connection with this case. The evidence will be briefly reviewed to show that the plaintiff-appellant failed to sustain the burden of proof imposed upon him.

The only real question involved in the trial of this case and in this appeal is whether or not there was any negligence on the part of the defendant-appellee. It will be argued that the evidence and testimony presented at the trial conclusiviy show that the defendant-appellant used a high degree of care to guard against an incident such as this. The view of the premises by the Trial Judge, the photographic exhibits and the testimony of the three expert witnesses in the electrical field will be emphasized in our arguments on the liability issue.

Each of the general specifications of error urged by appellant will be separately considered.

ARGUMENT

This case involves the liability of the United States under the Federal Torts Claims Act for an injury to a child trespasser. The alleged accident occurred in Montana and that state's law controls. *McGill* v. *United States*, 200 F2d 873. Montana adopts the view of the Restatement of Torts. *Nichols* v. *Consolidated Dairies*, 125 Mont. 460, 239 P.2d

740 (1952). Section 339 of that Restatement reads as follows:

> "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if
>
> (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

The Restatement does not develop in any detail what a land owner must do to avoid liability when he has a dangerous condition on his land, or, to put it another way, it is not clear whether a properly guarded dangerous condition is within the purview of the doctrine.

The above cited case, *Nichols* v. *Consolidated Dairies*, quotes with approval from the case of *Gates* v. *Northern Pacific Railway Company*, 37 Mont. 103, 94 Pac. 751, 755, where the majority opinion said:

> "It is my judgment that when the owner or occupier of

> grounds brings or artificially creates thereon something especially attractive to children, as shown by the nature of the thing itself and the fact that a child was, or children were, attracted to it, and leaves it so exposed that they are likely to come in contact with it, either as a plaything or an object of curiosity, and where their coming in contact with it or playing about it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to use ordinary care to guard it so as to prevent injury to them."

It would thus appear that in Montana under the *Gates* and *Nichols* decisions the defendant was only bound to use ordinary care to prevent injury to children.

The general view appears to be that an owner of land with a dangerous condition on it which he knows will attract children has a duty to prevent against probable danger, not against all possible harms. *James* v. *Wisconsin Power and Light Company,* 266 Wis. 290, 63 N.W. 2d 116 (1954); *Keep* v. *Otter Tail Power Company*, 201 Minn. 475, 277 N.W. 213 (1937). In *Kosson* v. *West Penn Power Company*, 293 Penn. 131, 141 Atl. 734 (1928), the Court declared at page 134:

> "Parties are bound to guard only against what could reasonably be foreseen . . . it is possible someone falling from an aeroplane might come in contact with a live wire but no one would suggest against the necessity of guarding against such an occurrance."

Our first general argument is that the burden was on the plaintiff throughout the case to prove the negligence com-

plained of. We contend that the plaintiff not only did not carry this burden, but that they completely and utterly failed to introduce any testimony or evidence showing or tending to show negligence on the part of the Government. The only evidence in any way relating to this subject was the testimony that Stanley Matt Johnson was in fact electrocuted inside the Bureau of Reclamation substation at Forsyth, Montana. As a matter of fact or law, this is not sufficient to prove negligence on the part of the Government. There was no showing that a reasonable man in like circumstances would have done anything different during the time before the accident than was done by the Government. The expert witnesses, M. M. McIntyre, A. P. McDonald and Ray Ball, certainly did not give any testimony showing that they, or firms they were associated or acquainted with, would have taken any additional precautions on and before July 4, 1955. Mr. Joe Baugh, the only other witness from the electrical field, did not make any comments along this line. The rest of the witnesses were from Forsyth and testified as to other factual and related matters, but not as to the structure itself.

The most that can be said is that some evidence was introduced and testimony presented concerning the fence structure at the time of the accident. A great deal of this evidence and testimony was made superfluous by the fact that the Trial Court viewed the premises before rendering its decision (page 11, Judge Jameson's Opinion).

It seems that the Trial Court was asked to decide whether a given situation constituted negligence without being supplied any guideposts upon which to base its reasoning, other than very general statements of law. There was no showing that the fence and gates enclosing the substation, not being mechanically dfective in any way, did not represent a high degree of care, commensurate with the danger, as would safely guard against any contingency that could reasonably be anticipated.

Foreseeability cannot be tested by what ultimately happens. Foreseeability should be tested, after an accident, to a certain extent at least, by those who work in the field of testing substations, whose career is bound up with success in providing such protection. That is why due weight should be given to members of the industry who testified that this is the way substation fences are built in this industry, and who provide assurances that such fences are not made with knowledge that they constitute potential dangers to trespassing children. The fact of the child's scaling the fence no more proves negligent construction or negligent planning of the protective facilities of this substation than the fact of a child being run over proves that the driver of the automobile was negligent. Not even a presumption of negligence is raised.

It is generally submitted that the following factors on the liability issue were determinative of the issue and that all of them favored the appellee. First is the fact that the

Trial Judge had an opportunity to view the premises after the testimony and with a full knowledge of the modifications that had been made (Opinion, page 1, line 18; page 11, line 9). He had an opportunity to appraise all of the circumstances surrounding this case and the testimony and exhibits in the light of his own view of the premises. The testimony (page 323, lines 10 to 22) gave him an understanding of the reason for the location of the substation at that particular place. He was able to see the location of the various homes in the area, the location of the M.D.U. substation and its pole rack and pipe rack, as well as to see the wooden box spoken of in testimony (page 85, lines 10-17) and referred to in appellant's brief (bottom of page 4, and top of page 5) and to see that it served a valid purpose within the substation (Tr. page 113, lines 11-25; page 114, lines 1-19) and had no possible connection with the deceased boy's ability to climb the oil circuit breaker framework. One factor not drawn out in the testimony that was gained by his view was the knowledge that there was no shortage of places for children to play in this area. There were uninhabited hills within a very short distance and uninhabited clear areas as well. The point being that the substation area was not a focal point upon which the neighborhood children descended to play. It was on the outskirts of town with large yards and ample undeveloped areas for playing, and, spacewise, more active games and gatherings were apt to be played and held elsewhere. The Trial Judge had an oppor-

tunity to get a true perspective of the fence and gate, as well as of the framework supporting the oil circuit breakers, the oil circuit breakers themselves, the porcelain bushings projecting upward from them and the caps and wires leading into these bushings. The various photographic exhibits make it apparent that the caps at the top of the bushings, where it is alleged the boy made the regrettable electrical contact, were considerably more elevated than the top of the fence, which was approximately eight feet. This height, protecting a point of danger, was an additional safety factor, and certainly something considered by the Trial Judge in his view of the premises, and something to be considered by this Court. He also had an opportunity to analyze any particular sound that might emanate from the substation.

Secondly, on the liability issue, are the various photographic exhibits showing the substation fence and the mechanisms contained therein. They show a well-painted and well kept-up appearance. There is nothing there that would appear to be susceptible of being taken for investigation by a curious youngster. Youngsters are natural collectors and attracted to dirt, discarded equipment and junk of all kinds, of which any parents' back yard is living proof. Here we have in the substation and the fence itself almost a clinical atmosphere of cleanliness and neatness. This is pointed out because that neatness and almost clinically clean atmosphere is to some extent a safety factor against young children inasmuch as it is symbolic of adult interest

in their minds, and suggestive, even at a very early age, that it should be left alone. Primarily, the photographic exhibits show the fence and gates from a standpoint of liability and it is our strong contention that they illustrate a high degree of care on the part of the United States of America to protect against unauthorized entry.

The third major item in this case on the liability issue is the testimony of the three expert witnesses, A. P. McDonald, Ray Ball and M. M. McIntire. These men represented more than 100 years experience in the electrical field (Tr. page 27, lines 21 and 22; page 319, lines 13 through 25; page 320, lines 3 through 11; page 336, lines 10 through 21; page 337, lines 9 and 10) in the western portion of the United States. They testified directly and by inference that based on their professional experience they felt this fence, and particularly the easterly gate of the substation, represented a high degree of care toward the public and fully and adequately guarded against possible unauthorized entry. It is important to note that Mr. Ball is presently in charge of and has the final decision to make as to whether substation fences in his own company are adequate to prevent unauthorized entry (Tr. page 340, line 9), and that Mr. McDonald had the same responsibility with possibly a larger organization (Tr. 320, lines 5, 6 and 7) until almost the time of the accident complained of.

Previous to the trial they were given the opportunity to see the Bureau of Reclamation substation at Forsyth, Mon-

tana, having knowledge of the changes that were made after this accident. The second fact established by the testimony of the three expert witnesses in this case, specifically Mr. McDonald and Mr. Ball, is that the construction of the fence and gates surrounding this substation met or exceeded the highest standards of their own companies, and other electrical companies and properties with which they were familiar (Tr. page 326, lines 9 and 10 and 22 through 25; page 341, line 5; page 343, lines 19 through 21).

Mr. Ball and Mr. McDonald testified (at the same approximate references in the transcript) concerning the specific types of enclosures used by the organizations they had been connected with, and as to the types of enclosures used by other agencies and firms with which they were familiar, so that the Trial Court had an opportunity to make its own decision as to whether the fences and gates were in fact comparable to the present situation.

The third point gathered from the testimony of the three expert witnesses, A. P. McDonald, Ray Ball and M. M. McIntire, is that none of them had ever heard of a child scaling a fence around an electrical substation and being electrocuted therein, either in their own companies or in other companies (Tr. 325, lines 12 through 15; page 331, lines 10 to 12; page 344, lines 5 to 9; page 347, lines 11 to 14 and lines 20 to 23; and, page 352, lines 2 to 4 and lines 9 to 16). This testimony is certainly important from the standpoint of foreseeability.

ARGUMENT ON THE SPECIFICATIONS OF ERROR URGED BY APPELLANT

The appellant urges as his first specification of error that the Trial Court was in error in failing to find the defendant negligent by its failure to install a 45° angled protection upon the gate as well as upon the fence, and that the Trial Court should not have allowed testimony to be admitted showing the industry standard of care.

We have heretofore presented general arguments on the liability issue based on the Judge's view, testimony and evidence in the case. We will now present our arguments based upon case law as it is developed.

In the *Gates* case *(Gates* v. *Northern Pacific Railway Co.,* 37 Mont. 103, 94 Pac. 751, 755) the Montana Supreme Court quotes at length from the "TURN TABLE CASE" *(Stout* v. *Sioux City and Pacific Railway Co.,* 2 Dill. 294, Fed. Cas. No. 13,504) which defines negligence as follows:

> "negligence is the omission to do something which a reasonable, prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do, under all the circumstances surrounding the particular transaction under judicial investigation."

The Montana Court quotes further:

> "to find against the defendant you must find that it has been guilty of neglect, of a wrong, of a want of due and proper care in the construction of machinery of a dangerous character, and, so leaving it exposed, as before explained, that, as reasonable men, the officers of the road ought to have foreseen that an acci-

dent, happening as this happened, would probably occur, or be likely to happen."

It has been said:

". . . *the Courts cannot make electric companies insurers of the safety of children* any more than of others or require of such companies, in the circumstances of their business, a degree of care, prudence, and foresight beyond that which careful and prudent men would exercise in such or like circumstances." (Emphasis supplied) *18 Am. Jr., Electricity*, §68.

The same citation in §69 says:

"Thus, if the injury occurs in a street or other public place, the circumstances must be very peculiar to relieve the electric company of liability; but if it occurs on the property of the power company, there must be peculiar circumstances to hold the company liable. The situations lying between these two extremes are governed by various shades of legal principle."

In a Wisconsin case the court says:

"An owner of land is required to foresee or anticipate probable harm to others; he is not required to guard against every possible danger to children or others." *James* v. *Wisconsin Power & Light Co.*, 266 Wis. 290, 63 N.W. 2d 116 (1954).

This seems to be the general view of the courts:

"Moreover, the rule of reasonable care must be considered *not* in the light of the accident which happened but with reference to that which ordinary prudence should have anticipated as likely to happen. The mere fact that an accident was avoidable does not prove that there was fault in not anticipating and providing against it." *38 Am. Jur., Negligence*, §32; *Johnson* v. *New York*, 208 N.Y., 77, 101 N.E. 691, 46 L.R.A. (N.S.) 462; *Newport News & O.P.Ry. & Electric Co.* v. *Clark's Adm'r* 105 Va. 205, 52 S.E. 1010, 6 L.R.A. (N.S.) 905, 115 Am. St. Rep. 868. (Emphasis sup-

plied).

Naturally there are situations (and electrical transmission line structures are undoubtedly among them) wherein a high degree of care is necessary to constitute ordinary care on the part of the person responsible. *Gilligan* v. *City of Butte*, 118 Mont. 350, 166 P. 2d 797; *38 Am. Jur., Negligence*, §32.

A 1955 case decided by the Supreme Court of Kansas seems to briefly state the proper standards of care to be applied in a situation such as the present case:

> "For present purposes and in a summary and not exhaustive manner, it may be said that our cases recognize that a high degree of care is required in the furnishing and distributing of electricity, —the care exercised in installation and maintenance must be commensurate with the danger and provide such protection as will safely guard against any contingency that is reasonably to be anticipated; that a distributor of electricity has complied when he so maintains his distribution system and is not bound to safeguard against occurrences which cannot reasonably be expected or contemplated. It may be further observed that in determining whether the distributor has met *the degree of care required is not that safer devices and equipment than were used are in existence,* and it is proper to take into consideration the use by the distributor of methods, appliances and equipment customarily used in the industry, *but such use of customary methods, appliances and equipment is not, in and of itself, a complete defense but may be shown as demonstrating that the distributor used that degree of care which prudent men engaged in the industry would use under similar circumstances.* If by reason of circumstances as to location or other facts leading to the necessity for greater care than would ordinarily be required, the

> distributor must make reasonable effort to adopt such appliances, methods and equipment as are commensurate with the increased hazard." *Murphy* v. *Central Kansas Electric Cooperative Association, Inc.,* 284 P. 2d 591 (1955). (Emphasis supplied).

Another case has said that while the general usage of electric companies furnishes a presumptive standard as to the care required, the presumption may be rebutted, *Jeffries* v. *Virginia Ry. & Power Co.,* 127 Va. 694, 104 S.E. 393. This further emphasizes the importance of knowing the customary and common practice in the industry.

A California case has said that an electric company was required:

> "to use best materials and most approved methods of construction to prevent injury to property of others." *Holmes* v. *Southern Cal. Edison Co.,* 177 P.2d 32.

Any number of cases have laid down the rule that:

> "conformity by defendant to general custom of power lines and rights of way does not excuse defendant unless the practice is consistent with due care." *Anstead* v. *Pacific Gas & Electric Co.,* 203 Cal. 634, 265 Pac. 487; *McCormick* v. *Great Western Power Co.,* 134 Cal. App. 705, 26 P.2d, 322; *Lim Ben* v. *Pacific Gas & Electric Co.,* 101 Cal. App. 174, 281 Pac. 634; *Polk* v. *City of Los Angeles,* 26 Cal. 2d 519, 159 P.2d 931; *Chase* v. *Washington Water Power Co.,* 111 P.2d 872.

The appellant has cited a 1957 New Jersey case, *Wytupeck* v. *City of Camden,* 136 Atlantic 2d 887. That case involved several factors that distinguish it from the present situation. The City of Camden owned 14 acres of land used for the maintenance and operation of 5 wells and water pumping stations. The wells were enclosed in brick well houses or

pumping stations

> "and each of the well pumps was equipped with an outside bank of 3 transformers, to reduce the voltage of high power lines to that required for the operation of the well pumps. The transformers were adjacent to the well houses, enclosed by an 8-foot high steel 'wire mesh or chain link fence with 2 inch diamond shaped openings, commonly referred to as a "cyclone" fence'; the fences were built on a 'concrete platform supporting the transformers as well'; the 'top of the fence had the sharply pointed ends of the wire projecting upwards'; and on 'each side of the fence ever since its erection were signs with 6 inch letters reading "DANGER—HIGH VOLTAGE" '; the chain link fence had a 'top rail' and '2 inch mesh.' " *Wytupeck* v. *City of Camden*, *supra*, at page 890.

This discussion of the fence is somewhat inconclusive in that the inference is raised that part of the fence may have had a top rail whereas other parts may have had only the sharply pointed ends of the wire projecting upwards. It is pointed out that the fence did not have a barbed wire extension on top of the wire mesh fence either vertically or at an angle.

The second differentiating circumstance is that the boy was injured when he placed his leg over the top of the fence preparing to descend into the enclosure. Contact was made with an uninsulated wire which was only 10 to 15 inches from the top of the fence. A further distinguishing feature, a violation of the Electrical Safety Code, by the uninsulated wire, was brought out in the testimony of one witness at page 892:

> "And the 'absolute minimum' distance for 'voltages between 3,000 and 6,000, the horizontal clearance to apply there is given (by the Electrical Safety Code prepared by the United States Bureau of Standards) as 3 feet, six inches,' . . ."

The appellant emphasizes the testimony of one of the expert witnesses on page 892 wherein he is quoted as follows:

> "The mounted barbed wire offset arms had been 'standard' and 'accepted practice of the whole industry' for more than 30 years and 'was one of earlier things that was considered in electric light and power industry, safety or substations.' "

A 1944 Arizona decision, *Holbrook Light and Power Co.* v. *Gordon,* 61 Ariz. 256, 148 P.2d 360, said:

> "a safe, or at least a safer, way of preventing persons from entering transformer stations would be to encircle the top of the fence with barbed wire so that a person approaching from below would have to overcome such obstructions—a most difficult thing to do. It is in evidence that some electric companies have adopted that method of safety."

This quotation would make it apparent that the Arizona Supreme Court in the western United States was not in agreement with the expert witnesses relied upon in the *Wytupeck* case, *supra.*

The evidence in the *Wytupeck* case showed that the 14 acre tract had long been used as a play and recreation ground by adults and children of all ages, and this is certainly another distinguishing feature.

The testimony shows the reason why industrial fences

such as the one surrounding this substation have straight posts at the gates and the 45° barbed wire projection outward at the top in between those places. (Tr. page 333, lines 21 to 24; page 334, lines 11 to 13). The barbed wire must be drawn tight, and normally this can be done better by using straight poles at the points of pressure. If you try to put pressure on an angle extending out from a pole, you are going to turn the pole and lose the pressure or tension on the wire. It is the same theory as bracing the corner poles when you are fencing. If you lose the tension in the 3 barbed wires running above the mesh fence, they might as well not be there.

The second general specification of error raised by appellant is that the Court erred in failing to hold that the addition of a barrier over the top of the east gate was evidence of negligence.

Paragraph XI of the Complaint in Civil No. 54 and Paragraph XIII of the Complaint in Civil No. 49 is as follows:

> "That immediately after the accident and death of the plaintiff's minor son, the defendant caused the east and west gates of said enclosure to be equipped with the same type of three strand barbed-wire barrier and overhang as were present on the balance of the enclosur prior to and on the death of plaintiff's minor son's death."

While the Montana Supreme Court has not had occasion, so far as we can find, to pass on the question, every jurisdiction but one which has passed on it has supported the general rule, announced as follows in *65 C.J.S., Negligence,*

§225, page 1042:

> "Evidence of the subsequent acts of one whose negligence is alleged to have caused or contributed to an accident or injury ordinarily is inadmissible to show antecedent negligence, although in a proper case, such evidence may be admissible for other purposes, as where evidence of subsequent acts, which by their nature tend to contradict other evidence as to the act or condition in question, is admissible in rebuttal."

The first edition of *Corpus Juris (45 C.J., Negligence, §1232)* subjoins citations occupying about two solid pages of six-point type, from the following Supreme Courts:

Alabama, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and the United States Supreme Court—forty jurisdictions in all. The mass of authority is of too great bulk to justify detailed discussion.

The reasons which are chiefly set forth may be summarized by the statement that the action of one accused of negligence in repairing or improving an installation in or about which an accident has happened, has no legitimate function to raise an inference of pre-existing negligence; and that public policy would be offended by penalizing such person

for his effort to prevent similar accidents in the future.

Early decisions in Minnesota and Pennsylvania adopted the contrary rule, but in both said states such rulings were overruled. The United States Supreme Court in *Columbia Ry.* v. *Hawthorne,* 144 U. S. 202, quoted with approval the later Minnesota case of *Morse* v. *Minneapolis Ry.,* 30 Minn. 465, 16 N.W. 358, and also *Hart* v. *Lancashire Ry.,* 21 L.T.R. (N.S.) (Eng.) 261, 263, as follows:

> "The true rule and the reasons for it were well expressed in *Morse* v. *Minneapolis & St. L.R. Co.,* above cited, in which *Mr. Justice Mitchell,* delivering the unanimous opinion of the Supreme Court of Minnesota, after referring to earlier opinions of the same court the other way, said: 'But, on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstance, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some courts, that the acts of the employees in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence.' 30 Minn. 465, 468.

"The same rule appears to be well settled in England. In a case in which it was affirmed by the Court of Exchequer, Baron Bramwell said: 'People do not furnish evidence against themselves simply by adopting a new plan in order to prevent a recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before.' Hart v. Lancashire & Y. R. Co. 21 L.T.R. (N.S.) 261, 263."

Kansas is the lone jurisdiction at variance with the rule of inadmissibility, and then that court has whittled down the scope of admissibility to hold, in *White* v. *Berkson Bros.*, 187 Pac. 670, that such proof is of itself not enough evidence of neglicence to take a case to the jury. We quote from the last cited case as follows:

"2. As soon as the accident occurred a change was made in the walk by raising it to its old position on a level with the doorsill. The plaintiff urges that this in itself was competent evidence that the defendant had been negligent in suffering the existence of the step. Th great weight of authority is against the admission of evidence that changes or repairs were made after the accident, for the purpose of showing negligence in permitting the former condition to exist. 2 Wigmore on Evidence, §283; 2 Jones on Evidence (Horwitz Ed.) §288; 20 R.C.L. 179, 180. The rule allowing the admission of such evidence has been abandoned in nearly or quite all the jurisdictions outside of Kansas in which it was at one time recognized. Note 32 L.R.A. (N.S.) 1127, 1134. Here, however, it remains in force. Howard v. Osage City, 89 Kan. 205, 132 Pac. 187. The admission of such evidence can hardly be harmful in itself, and in some situations it may be helpful, as aiding in the solution of an existing issue of fact. But

> where, as in this instance, there is otherwise no basis for submitting the question of the defendant's liability to the jury, the lacking ingredient cannot be thus supplied. The employer is not bound to adopt the safest possible construction, and if, after an accident, he sees fit to change a reasonably safe arrangement into a still safer one, he cannot merely by that act be subjected to a liability which would not otherwise exist."

The last sentence appears to be an admission by the court that reason and authority are both against the Kansas rule.

There are two Montana cases wherein evidence of a changed condition after an accident has been allowed, not for the purpose of proving negligence, but for the purpose of throwing light upon the condition of the premises at the time when the injury occurred. In *Titus* v. *Anaconda Copper Mining Company*, 47 Mont. 583, 133 Pac. 667, an action charging negligence as a result of a defective condition of a machine, our Court said:

> "It is elementary that evidence of repairs or improvements is not evidence of prior negligence. The plaintiff assumed the burden in this instance of showing (a) that the bracket was out of repair at the time he was injured, and (b) that such condition was due to the defendant's negligence. While evidence of the condition of the bracket on the day following the injury would not tend to prove negligence, it might throw light upon the condition of the bracket when the injury occurred, and for this purpose the evidence was admissible."

In *Pullen* v. *City of Butte,* 45 Mont. 46, 121 Pac. 878, the City was charged with negligence in connection with a defective sidewalk. The Court said:

> "It is a general rule that the negligence which renders a person responsible for an accident depends upon what he did and knew before the accident, and such negligence must be established by facts and circumstances which preceded it, and not by acts done after its occurrence."

Some testimony had been allowed in the case showing a subsequent repair of the sidewalk but the trial court limited it to the purpose of throwing some light on what the condition was at the time of the accident.

It is therefore submitted that the Montana and general rule apply in this case. The appellant tries to isolate the present situation from the general rule by a continuation of his argument that to have a 45° barbed wire overhang over part of the fence structure is an admission that it is the proper standard of care, and should therefore have been continued on the gates.

Your attention is invited to the testimony of the Montana-Dakota Utilities Co. serviceman, Joe Baugh, in connection with the modifications made to the fence surrounding the Montana-Dakota Utilities Company substation after this accident, wherein he admitted to the view that the modifications made after the accident made the fence easier to climb over because of the additional hand holds supplied (Tr. page 121, lines 2-11). It is submitted that the contraption placed over the gates of the Bureau of Reclamation substation at Forsyth, Montana, after this accident is subject to the same comment.

Appellant's third major specification of error is that the Court erred in allowing the defendant to amend its answer and introduce testimony on the issue whether the father of the boy had been contributarily negligent in allowing him to play outside of the yard.

The United States of America's "Notice of Motion to Amend Answer" filed on January 13, 1958, in Civil No. 54 proposed to amend the answer by adding a new paragraph 8 to its answer, which was set out to read as follows:

> "8.
>
> That prior to July 4, 1955, on or about July 5, 1955, at the time of the accident complained of, the plaintiff, as a parent, was negligent in failing to exercise ordinary care in protection of the minor child and that such negligence was a proximate and contributing cause of the death of said minor child."

The law recognizes the duties of parents to exercise ordinary care in the protection of their minor children. A 1945 California case discusses this as follows:

> "The conduct of small children is unpredictable and their propensity to wander from their premises and into the streets is a matter of common knowledge. Springer v. Sodestrom, 54 Cal. App. 2d 704, 129 P2d 499. Parents are therefore chargeable with the duty of exercising ordinary care in the protection of their minor children. Seperman v. Lyon Fire Proof Storage Company, 97 Cal. App. 654, 275 P. 980; Healy v. Market Street Railway Company, 41 Cal. App. 2d 733, 107 P2d 488. Where the failure of the parents to

> exercise such care proximately causes or contributes to the injury or death of their child the action of the parents for damages is thus defeated. De Nardi v. Palanca, 120 Cal.App. 371, 8 P.2d 220; Seperman v. Lyon Fire Proof Storage Co., supra." *Agdeppa* v. *Glougie*, 71 Cal.App. 2d 463, 162 P.2d 944, 945.

The case law on contributory negligence by a beneficiary is discussed in 25 *Corpus Juris Secundum, Death, Section 46, Contributory Negligence, at page 1141, 1142 and 1143.* We find no Montana case cited, but the text says under subsection b:

> "Contributory negligence of a beneficiary is generally a defense to an action for death brought by or for such beneficiary, although there is authority to the contrary."

In California the negligence of one parent bars recovery by the other parent or by the parents for the death of a child. *Dull* v. *Atchison, Topeka & S.F. Ry. Co.*, 27 Cal. App. 2d 473, 81 P.2d 158. Idaho and Washington seem to accept the theory of contributory negligence by the beneficiary as a defense. A Wisconsin case, *Hansberry* v. *Dunn*, 230 Wis. 626, 284 N.W. 556, apportioned the damages to compensate for the negligence of only one of the parties.

Appellant's contention is aimed at the Trial Court's allowing the amendment of the answer, but it is perhaps worthwhile to note that substantial evidence was presented on this rather difficult subject. The city police in Forsyth were involved with the Johnson children on three occasions and at least two other situations were shown by the testi-

mony of Mr. Robert H. Kerr. The strongest testimony on the question of whether the parents were overly lax in supervising their children, and specifically Stanley Matt Johnson, and whether they enjoyed a reputation for such a course of conduct, is best shown by the testimony of the Forsyth Chief of Police, Paul Fourtner. He testified that on one occasion he told Mrs. Johnson "the next time I was going to do smething about it" (Tr. 296, lines 19 and 20), and also that he went to the plumbing shop where the father worked and discussed the problem with him, and suggested he put up a fence to keep his children home and presumably out of danger (Tr. 297, lines 13 and 14; page 298, at lines 19, 20 and 21). These remarks suggest they were based on more than a couple of isolated contacts, but rather that the ramblings of the deceased child were a matter of common knowledge by the authorities and others in Forsyth.

The fourth major specification of error urged by the plaintiff-appellant is that the Court was in error in denying the plaintiff the right to have access to the statements taken by the FBI agent from the doctor and nurse attending the child.

Oral arguments were had on the motion for the production of these statements, and the Court is referred to pages 9, 10 and 11 of the trial transcript commencing with line 10 on page 9 and ending with line 8 on page 11 for the opposing argument to the granting of this motion.

The fifth major specification of error is the contention that the Court was in error in denying the plaintiff's motion to re-open the case, and in denying the plaintiff's motion for a new trial.

Barron & Holtzoff discuss Rule 59 of the Federal Rules of Civil Procedure as it applies to newly discovered evidence in Section 1305, on page 238 of Volume 3, of Federal Practice and Procedure with Forms, Rules Edition. Their statement on newly discovered evidence reads as follows:

> "Newly discovered evidence to afford ground for a new trial must be evidence of facts existing at the time of trial, of which the moving party was excusably ignorant. The movant for a new trial must show diligence in discovering such evidence. *He is required to rebut the lack of presumption that there has been a lack of diligence.* Newly discovered evidence must be admissible and probably effective to change the result of the former trial. *Newly discovered evidence which would merely affect the weight and credibility of the evidence or witnesses is no ground for a new trial unless it clearly appears that harmful error occurred at the trial. Hearsay testimony is no basis for seeking a new trial.*" (Emphasis supplied).

Another reference in 39 Am.Jur., New Trial, §190, says:

> "To entitle a party to a new trial on the ground of newly discovered evidence, *the motion should set forth the names of the witnesses who are expected to testify to the alleged new matter*, show what the evidence is, so that the Court may be able to judge of its sufficiency, and, also, state such facts as will enable the Court to determine the question whether reasonable diligence was exercised. General averments as to diligence are not sufficient; the facts should be set out so as to neg-

> ative fault on the part of the movant." (Emphasis supplied).

The same citation in §198 on page 197 reads:

> *"In view of the temptation to obtain a rehearing after an adverse verdict . . ."* (Emphasis supplied).

It would appear that in this case the attorneys for the plaintiff may have become more diligent after the adverse decision than the record shows them to have been prior to that time.

American Jurisprudence has this to say regarding the granting or the refusal of the application for a new trial in *39 Am. Jur., New Trial,* §201, at page 199:

> "A motion or other application for a new trial is directed to the sound judicial discretion of the trial court." (See also Pittsburgh C. & St. L.R. Co. v. Heck, 102 U.S. 120, 6 L.Ed. 58.)

A 1938 Federal Case in the District Court for the District of Connecticut, *Schick Dry Shaver, Inc. et al.* v. *General Shaver Corporation, et al.,* 26 F.Supp. 190, 191, discusses the grounds for a new trial and says:

> "It must appear, in order that a new trial may be granted upon the ground of newly discovered evidence, (1) that the evidence has been discovered since the trial; (2) that it could not have been discovered before the trial by the exercise of reasonable diligence; (3) that it is material in its object, and such as ought on another trial to produce an opposite result on the merits; and, (4) that it is not cumulative, corroborative or collateral."

The Fifth Circuit Court of Appeals in a 1948 case has dealt with time as an element of diligence. The case is cited

as *Pasotex Pipe Line Co.* v. *Murray,* 168 F.2d, 661. One of the grounds for a new trial was newly discovered evidence, in that a former husband of the plaintiff was located after the trial and gave proof of a prior injury. The Court said:

> "Appellant complains that in spite of not knowing that Atkins could throw light upon the disputed injury, it had used due diligence and care to find him but had been unsuccessful until after the trial. With this last, we cannot agree. The accident occurred in January, 1946, and the second trial was concluded on September 22, 1947. Mr. Atkins had lived in Houston and worked for the same company for eight years or more. It should have been a simple matter, within a year and eight months, to get his correct name and to trace him. We think appellant's failure to do so constitutes a lack of diligence."

About two and one-half years elapsed between the accident in the present case and the trial. This is considerably longer than the year and eight months in the *Pasotex* case. Almost any study of the merits of the case would suggest that the safety measures adopted by other companies in the general area would be of some evidenciary value. In the *Pasotex* case they were looking for a witness without knowing he had any relevant information, and here they were looking for information from readily available sources that they should have known might have been valuable to their case. It would seem that under the rule adopted in the Fifth Circuit, the necessary diligence would be lacking in support of the motion in this case.

Barron & Holtzoff, supra, indicates that it is necessary

to rebut the presumption that there has been a lack of diligence. It is possible to do a great deal of investigating in a period of two and one-half years, and it is submitted that the presumption of a lack of diligence is strong in this case.

The defendant-appellee presented three expert witnesses in connection with the defense of this action, though Mr. M. M. McIntire was also called by the plaintiff-appellant. The same type of evidence produced by the defense was certainly available to the plaintiff. The Trial Court situated in Billings, Montana, where the trial was held might have taken note of this fact in its consideration of the case. It is not contended that testimony along these lines would have been controlling or conclusive, but it would certainly have been relevant and a guide-post for the Court to consider.

It is our contention that, irrespective of the question of due diligence, the motion to re-open the trial was not sufficient in that it failed to state the name or names of the witnesses they proposed to use, who the operator of the substation or substations referred to in the affidavit were on July 4, 1955, whether as a matter of fact such safeguards were in use on July 4, 1955, and where they are located. The affidavit was made by one of the distinguished counsel for the plaintiff-appellant, Franklin S. Longan. Any testimony he could have given as to the condition of these substations on July 4, 1955, would not have been the best evidence, but would have been hearsay, and inadmissible. It can thus be seen that the affidavit and the motion which it

supported were insufficient, in that they did not set forth with definiteness any proposed evidence that could have produced an opposite result to the trial. It should further be pointed out that the affidavit did not state that the same type of gates were involved, or gates for the same purpose, as those in use at the Forsyth substation on July 4, 1955.

CONCLUSION

In conclusion it appears that the determining factor on the question of liability is the sufficiency of the fence at the gate as constructed on July 4, 1955, as a safeguard against the entry of young children and particularly the decedent.

The Trial Court's view of the premises and adjacent areas would be enough alone to support the judgment appealed from in this action. It is not contended that the Trial Court viewed the premises either from the standpoint of a heedless infant or of a child having the ability to read the warning signs, but rather that the Court viewed the premises from the standpoint of a reasonable man taking into account all of the facts and circumstances shown by the evidence to have existed on July 4, 1955, and thereupon reaching the conclusion that *the defendant had exercised due care under the circumstances.*

The evidence showed a well constructed, well kept up substation and fence; that the gates met or exceeded the safety standards of the industry; and, that they represented a high degree of care toward children in general and the deceased child in particular.

It is urged that based upon the evidence and the law, the lower Court's Opinion, Findings of Fact, Conclusions of Law, and Judgment are substantially supported and the Judgment should be affirmed.

Respectfully submitted,

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